

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

EDWARD N. DETWILER, an  
individual,

Petitioner,

v.

EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR CLARK  
COUNTY; THE HONORABLE  
RICHARD SCOTTI, DISTRICT  
JUDGE, DEPT. 2,

Respondent,

and

BAKER BOYER NATIONAL  
BANK, a Washington corporation,

Real Party in Interest.

Supreme Court Case No.: \_\_\_\_\_

District Court Case No. **Electronically Filed**  
**6: A-17-7607-19**  
**May 22 2020 04:52 p.m.**  
Elizabeth A. Brown  
Clerk of Supreme Court

**PETITIONER'S EMERGENCY MOTION UNDER NRAP RULE 27(e) TO  
STAY EXECUTION OF CONTEMPT JUDGMENT PENDING REVIEW  
OF PETITION FOR WRIT OF MANDAMUS/PROHIBITION**

**[Relief Requested by: May 29, 2020]**

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Pursuant to pursuant NRAP 8 and 27(e), Petitioner, Edward N. Detwiler (“Detwiler”), files this emergency Motion to Stay Execution of Contempt Judgments<sup>1</sup> pending the review of his Petition for Writ of Mandamus/Prohibition. This motion is supported by the Appendix,<sup>2</sup> the following Memorandum, and all exhibits thereto.<sup>3</sup>

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. STATEMENT OF FACTS**

Petitioner Edward N. Detwiler (“Petitioner” or “Detwiler”) respectfully requests this Court issue a stay of any collection or other proceedings while reviewing his petition for writ of mandamus or prohibition (“Petition”) filed herein. As set forth in the Petition<sup>4</sup>, the underlying case, case no: A-17-760779-F (“Underlying Case”), began on August 31, 2017 when an entity calling itself “Baker Boyer National Bank, a Washington Corporation” (“BBNB”), filed an application to enforce a foreign judgment against the underlying defendant/debtor, James

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<sup>1</sup> The Court entered an Order for Sanctions, as well as two (2) judgments entitled “Order and Judgment.” For purposes of clarity, as the two judgments entered were duplicative, they shall collectively be referred to herein as the “Judgment.”

<sup>2</sup> The record is provided in the Appendix submitted with the Writ Petition and references to said Appendix will be cited as follows: “Appx. Vol. [#], at PA[#]”.

<sup>3</sup> Given that this Motion addresses: (1) the multiple, serious violations of Detwiler’s constitutional/due process rights; and (2) BBNB commencing collection efforts in violation of the current Stay Orders, Detwiler respectfully requests that this Court permit this Motion to exceed ten (10) pages pursuant to NRAP 27(d)(2).

<sup>4</sup> Petitioner incorporates his statement of facts as set forth in the Petition.

Patterson Foust, Jr. (“Foust” and “Foust Judgment”).<sup>5</sup> There is no entity named “Baker Boyer National Bank, a Washington Corporation.” The Washington Secretary of State (“SOS”) confirms it does not exist.<sup>6</sup>

The fight below was between BBNB and Foust over some vehicles (“Subject Vehicles”) Foust allegedly had represented he possessed, and offered as security for a loan he obtained from BBNB.<sup>7</sup> BBNB sought their turnover to satisfy the Foust Judgment.<sup>8</sup> Foust asserted the Subject Vehicles were owned or possessed by a company of which he was at one time an owner and manager, a Montana limited liability company known as Harry Hildibrand, LLC, (“HH”).<sup>9</sup> Detwiler became involved because he was, at one time, a manager of HH, although his role was limited to real estate aspects of HH.<sup>10</sup>

After an evidentiary hearing in late 2018, BBNB obtained an order in January, 2019 (“January 2019 Order”).<sup>11</sup> The January 2019 Order unequivocally found that Foust owned, possessed and controlled the Subject Vehicles, and controlled HH.<sup>12</sup> The January 2019 Order also found that any purported transfers of the Subject

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<sup>5</sup> Appx. Vol. I, at PA00001-PA00024.

<sup>6</sup> See Wash. SOS Certificates, Appx. Vol. IV, at PA00989 and PA00991.

<sup>7</sup> Appx. Vol. I, at PA00027-PA00028 and PA00053-PA00054.

<sup>8</sup> Appx. Vol. I, at PA00025-PA00061.

<sup>9</sup> Appx. Vol. II, at PA00311-PA00317.

<sup>10</sup> Appx. Vol. II, PA00335-PA00392, at p. 19, ll. 11-19 – p. 20, ll. 21.

<sup>11</sup> Appx. Vol. I, at PA00193-PA00220.

<sup>12</sup> *Id.*

Vehicles to HH or anyone else were fraudulent and void *ab initio*.<sup>13</sup> Confusingly, despite these findings, the January 2019, Order directed Foust and HH (including its managers and agents, including Detwiler) to turn over the Subject Vehicles.<sup>14</sup> The January 2019 Order did not clarify how it contemplated Detwiler turning over vehicles the Trial Court had found were owned, possessed and controlled by Foust.

Detwiler never had possession of the Subject Vehicles, and was unable to turn them over to BBNB.<sup>15</sup> Detwiler did contact Foust and tell him to comply with the Trial Court's order.<sup>16</sup> Foust did not. Subsequently, BBNB applied for and obtained an order to show cause why "defendants"—defined to include Foust and HH—should not be held in civil contempt.<sup>17</sup> Detwiler appeared at the civil contempt trial which took place over several hearings in April and May, 2019 ("Contempt Trial") without counsel.<sup>18</sup> Despite the possibility of civil sanctions against Detwiler personally, upon the request of BBNB's counsel, the Trial Court excluded Detwiler from the majority of Foust's testimony<sup>19</sup>, during which Foust put the blame on HH – and by extension, Detwiler – for not turning over the Subject Vehicles.<sup>20</sup> Detwiler

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<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at PA00214.

<sup>15</sup> Appx. Vol. II, at PA00411-PA00412.

<sup>16</sup> *Id.*

<sup>17</sup> Appx. Vol. I, at PA00221-PA00238.

<sup>18</sup> Appx. Vol. I/II/III, at PA00241-PA00310 and PA00318- PA00520.

<sup>19</sup> Appx. Vol. II, PA00346-PA00347 and PA00418.

<sup>20</sup> Appx. Vol. II, at PA00421-468.

was also not provided with a declaration filed by Foust (“Foust Declaration”) in which Foust stated that HH owned the Subject Vehicles, nor was Detwiler provided an opportunity to cross-examine Foust as to his allegations against him.<sup>21</sup>

In June, 2019, the Trial Court issued a contempt order against Foust (“Foust Contempt Order”), again reiterating and incorporating all findings from the January 2019 Order that Foust owned, possessed and controlled the Subject Vehicles, and owned and controlled HH.<sup>22</sup> BBNB had difficulty finding Foust. It then turned its sights on the low-hanging fruit: Detwiler. Unlike Foust, Detwiler had obeyed all court orders to appear and testify.<sup>23</sup>

However, Detwiler had resigned as manager of HH in September, 2019.<sup>24</sup> In fact, Detwiler wanted to resign before the Contempt Trial even started, and told counsel for BBNB he wanted to resign.<sup>25</sup> In violation of NRPC 4.3, counsel for BBNB dissuaded Detwiler from resigning from HH.<sup>26</sup> This was particularly egregious since the entire basis for the Trial Court’s later finding of contempt against Detwiler was based on his status as manager of HH.

Despite counsel for BBNB and the Trial Court being made aware of

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<sup>21</sup> Appx. Vol. II, PA00311-PA00317.

<sup>22</sup> Appx. Vol. III, at PA00521-PA00537.

<sup>23</sup> *See generally*, Transcripts of Contempt Trial (Appx. Vol. I/II/III, at PA00241-PA00310 and PA00318- PA00520).

<sup>24</sup> Appx. Vol. III, at PA00657-PA00658.

<sup>25</sup> Appx. Vol. II, at PA00357, ll. 18-24.

<sup>26</sup> *Id.*

Detwiler's resignation as manager of HH in September, 2019, BBNB sought and obtained – over objection of counsel on behalf of Detwiler to the Trial Court presiding over further proceedings pursuant to NRS 22.030(3) (“Objection”)<sup>27</sup> – an order of contempt against Detwiler (“Detwiler Contempt Order”).<sup>28</sup> Strangely, despite all of the findings in the January 2019 Order, and reiterated by the Trial Court in the Foust Contempt Order, that Foust owned, controlled and possessed the Subject Vehicles and HH, the Detwiler Contempt Order now found that Detwiler controlled HH and the Subject Vehicles.<sup>29</sup> The Detwiler Contempt Order also inconsistently found that somehow Detwiler had the ability to turn the Subject Vehicles over to the Bank, including one of the Subject Vehicles the bank had already repossessed, and four others which the Trial Court had previously found were not the proper subject of a contempt citation.<sup>30</sup> The Trial Court also issued a warrant for Detwiler's arrest and indefinite imprisonment until he turned over all 20 Subject Vehicles, even the one that had already been repossessed by BBNB and the four which the Trial Court itself had found were not properly the subject of a contempt citation.<sup>31</sup>

Through counsel, Detwiler filed a Rule 60(b) motion, arguing that he had

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<sup>27</sup> Appx. Vol. III, at PA00676-PA00677.

<sup>28</sup> Appx. Vol. III, at PA00688-PA00707.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, PA0704 at ¶ 29.

<sup>31</sup> *Id.*, PA0704 at ¶ 30.

resigned as manager of HH in September, 2019.<sup>32</sup> The Trial Court vacated the civil contempt findings and recalled the warrant against Detwiler.<sup>33</sup> However, the Trial Court made additional findings (over the Objection) that Detwiler should be sanctioned an unconditional amount of \$100,000 as punishment for his allegedly contemptuous violation of the January 2019 Order, as well as an additional \$218,855.52 in fees and costs (“Sanctions Order”).<sup>34</sup> The Sanctions Order was unconditional and did not contain a purge clause, thereby constituting a criminal sanction. A subsequent judgment (*i.e* the Judgment) was entered against Detwiler based on the Sanctions Order.<sup>35</sup>

The Trial Court violated Detwiler’s constitutional and due process rights and committed multiple errors warranting issuance of the requested writ.<sup>36</sup> Not only was Detwiler excluded from critical portions of his own Contempt Trial,<sup>37</sup> but as a result of his exclusion, Detwiler was not afforded his due process rights to confront and cross-examine adverse witnesses. *Awad v. Wright*, 794 P.2d 713, 716, 106 Nev. 407

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<sup>32</sup> Appx. Vol. III, at PA00708-PA00739.

<sup>33</sup> Appx. Vol. IV, at PA00835-PA00843.

<sup>34</sup> Appx. Vol. IV, PA00875-PA00882.

<sup>35</sup> Appx. Vol. IV, PA00950-PA00955.

<sup>36</sup> See U.S. Constitution, 5th, 6th and 14th Amendments; Nevada Constitution, at Article 1, §§ 3, 8(1) and 8(2); *Awad v. Wright*, 794 P.2d 713, 716, 106 Nev. 407 (1990); and *Warner v. District Court*, 906 P. 2d 707, 111 Nev. 1379 (1995). See also NRS 50.155(2)(a) & (d), NRS 171.204(1)(g), NRS 22.030(3), NRS 22.100(2) & (3) and EDCR 7.60(b).

<sup>37</sup> Appx. Vol. II, at PA00347, ll. 8-18. This violates NRS 50.155(2)(a) & (d) and NRS 171.204(1)(g).

(1990). Additionally, contrary to NRS 22.030(3) and binding case law in *Awad*, the Trial Court committed serious error by refusing to recuse itself from the contempt proceedings after Detwiler timely filed his Objection,<sup>38</sup> which occurred prior to the Detwiler Contempt Order or Sanctions Order being entered. *Awad*, 794 P.2d at 715.

Further, while the original Detwiler Contempt Order was conditional, indeterminate and civil in nature, the Trial Court vacated its finding of civil contempt and instead issued a punitive, unconditional and determinate sanction of \$100,000.00 - 200 times the maximum allowable fine under NRS 22.100(2) – along with attorneys’ fees and costs in excess of \$218,000.00, which constitutes criminal sanctions.<sup>39</sup> *Warner v. District Court*, 906 P. 2d 707, 709, 111 Nev. 1379 (1995).

Detwiler was provided no proper notice or opportunity to be heard on any criminal charge, nor even given notice that criminal sanctions were possible, further exacerbating the Trial Court’s violations of Detwiler’s due process rights afforded to him under the U.S. and Nevada Constitutions. *Id.*; U.S. Constitution, 5th, 6th and 14th Amendments; *see also* Nevada Constitution, at Article 1, §§ 3, 8(1) and 8(2).

On March 24, 2020, Detwiler filed a Motion to Stay Execution and Waive Supersedeas Bond. The motion was denied<sup>40</sup>, though the Trial Court recognized

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<sup>38</sup> Appx. Vol. III, at PA00676-PA00677.

<sup>39</sup> Appx. Vol. IV, at PA00875-PA00882 and PA00950-PA00955.

<sup>40</sup> Grounds for denial were: prejudice to BBNB; purpose of appeal not being lost; belief he will not be overturned; and Detwiler’s finances.

collection could not commence for 45 days from entry of the order on the motion. Stays of execution have been imposed by Eighth Judicial due to the current pandemic. Despite this, BBNB has filed a motion in violation of the applicable orders. Detwiler respectfully submits a stay should issue without the necessity of a bond to prevent a serious miscarriage of justice.

## **II. LEGAL ARGUMENT**

### **A. *This Court should issue a Stay after the District Court refused to do so.***

#### **1. BBNB's refusal to comply with the current stay Orders**

The Trial Court recognized a temporary stay of 45 days from notice of entry of the Order denying stay, which was filed on April 13, 2020. Appx. Vol. IV, at PA00992-PA00994. As such, the Trial Court's temporary stay expires **May 29, 2020**. Further, in response to the global pandemic of COVID-19, the District Court issued Administrative Order ("A.O.") #20-09, which stays execution until such Order is lifted.<sup>41</sup> In complete violation of these stay orders, on May 15, 2020, BBNB filed an Application for Charging Order, wrongfully claiming that "[Mr.] Detwiler's assets are subject to immediate execution." Appx. Vol. IV/V, at PA00999-PA01037. BBNB cannot claim that its Application is a ministerial act as it is requesting the Trial Court judge to issue a Charging Order.<sup>42</sup> Given COVID-19, as well as BBNB's

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<sup>41</sup> See A.O. #20-09, provided at: [www.clarkcountycourts.us/res/rules-and-orders/2020-04-17\\_10\\_58\\_29\\_administrative%20order%202020-13.pdf](http://www.clarkcountycourts.us/res/rules-and-orders/2020-04-17_10_58_29_administrative%20order%202020-13.pdf)

<sup>42</sup> *In re Montierth*, 131 Nev. Adv. Op. 55, 354 P.3d 648 (2015) (A ministerial act

refusal to follow the current stay orders, a stay pending is warranted.

**2. Petitioner is likely to prevail on the merits in the writ petition**

**a. The Trial Court excluded Detwiler from the Contempt Trial.**

Shockingly, the Trial Court unlawfully excluded Detwiler from critical testimony in the civil Contempt Trial, thereby denying Detwiler the opportunity to confront and cross-examine adverse witnesses.<sup>43</sup> In *Awad*, this Court provided the following due process requirement in indirect contempt cases: “...**due process requires that the person charged...have the right to confront witnesses....**”<sup>44</sup> Excluding Detwiler also violated NRS 50.155(2)(a) & (d) and NRS 171.204(1)(g).<sup>45</sup> The Trial Court disregarded the mandatory prohibition from excluding a person necessary for a defense from the Courtroom.<sup>46</sup> See NRS 50.155(2)(a) & (d) and NRS 171.204(1)(g). This Court has held that “prejudice is presumed when a violation of NRS 50.155 occurs unless the record demonstrates a lack of prejudice.”<sup>47</sup> Further, Detwiler was not provided necessary documents, such as the

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exception applies to automatic occurrences that entail no judicial involvement).

<sup>43</sup> Appx. Vol. II, at PA00347.

<sup>44</sup> *Awad v. Wright*, 794 P.2d 713, 716, 106 Nev. 407 (1990)(emphasis added).

<sup>45</sup> In excluding Detwiler from the Courtroom, the Trial Court indicated “*it doesn’t matter what [Detwiler] thinks.*” (Appx. Vol. II, at PA00347)

<sup>46</sup> Appx. I, at P00221-PA00228; Appx. Vol. II, at PA00351; and Appx. Vol. IV, at PA00839 and PA00880-881.

<sup>47</sup> *Heglemeier v. State*, 878 P. 2d 294 (1994); *Givens v. State*, 99 Nev. 50, 55, 657 P.2d 97, 100 (1983), *overruled on other grounds*, *Talancon v. State*, 102 Nev. 294, 301, 721 P.2d 764, 768 (1986).

Foust Declaration, nor informed of the substance of Foust’s testimony from which he was excluded, during which Foust accused Detwiler and HH of committing contempt. Detwiler’s due process rights were violated, and a stay is necessary.

**b. The Trial Court violated Detwiler’s constitutional and due process rights in issuing criminal sanctions.**

The original civil Contempt Order allowed Detwiler to purge himself from the contempt.<sup>48</sup> Upon filing a Rule 60(b) Motion, the Trial Court vacated the civil sanctions and subsequently issued the Sanctions Order, requiring Detwiler to pay unconditional and punitive sanctions of \$100,000.00 and attorneys’ fees and costs in excess of \$218,000.00.<sup>49</sup> This Court has previously clarified:

“[S]ince a civil contempt sanction is designed to coerce the contemnor into complying with a court order, it must be conditional or indeterminate — that is, it must end if the contemnor complies. ... In contrast, **a criminal contempt sanction is intended to punish the contemnor ... and, thus, must be determinate or unconditional.**”<sup>50</sup>

The Sanctions Order contained no purge clause, further rendering it a criminal sanction. *Lewis v. Lewis*<sup>51</sup> (“We hold that a contempt order that does not contain a purge clause is criminal in nature.”). Here, the Sanctions Order is criminal in nature

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<sup>48</sup> Appx. Vol. IV, PA00839-PA00840.

<sup>49</sup> Appx Vol. IV, at PA00875-P00882 and PA00950-PA00955.

<sup>50</sup> See *Warner v. District Court*, 906 P. 2d 707, 111 Nev. 1379 (1995), citing *Hicks v. Feiock*, 108 S.Ct. 1423, 1430, 99 L.Ed.2d 721 (1988); see also *Penfield Co. v. SEC*, 330 U.S. 585, 593, 67 S.Ct. 918, 922, 91 L.Ed. 1117 (1947) (An unconditional penalty is criminal in nature as it is “solely and exclusively punitive in character.”).

<sup>51</sup> 132 Nev. 453, 455, 373 P.3d 878, 879 (2016)

as it is punitive, unconditional and determinate, and contains no purge clause.<sup>52,53</sup> As criminal sanctions were issued against Detwiler, he is entitled to “the protections that the Constitution requires of such criminal proceedings”.<sup>54</sup> He was not afforded such protections. A stay is warranted on this basis alone.

**i. Constitutional and Due Process Violations**

The Trial Court violated Detwiler’s constitutional and due process rights as afforded to him by the U.S. Constitution (5th, 6th and 14th Amendments) and the Nevada Constitution (Article 1, §§ 3, 8(1) and 8(2)).<sup>55</sup> Prior to issuing criminal sanctions, the Trial Court did not provide Detwiler with the protections afforded to him under the U.S. and Nevada Constitutions.<sup>56</sup> Such violations require a stay.<sup>57</sup>

**ii. Detwiler was not provided proper notice or opportunity to be heard on any criminal charge**

It is equally fundamental that the right to notice and an opportunity to be heard “must be granted at a meaningful time and in a meaningful manner.”<sup>58</sup> Here, the

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<sup>52</sup> A court may not impose punishment “in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.” *Turner v. Rogers*, 564 US 431, \_\_\_ (2011); *Hicks*, 485 U.S. at 638, n. 9.

<sup>53</sup> Transcript 2/18/20, at 6:4-5 (Appx. Vol. IV, at PA00840, ll.4-5).

<sup>54</sup> *Mine Workers v. Bagwell*, 512 U.S. 821, 826, 114 S.Ct. 255 (1994) citing *Cooke v. United States*, 267 U.S. 517, 537, 45 S.Ct. 390 (1925).

<sup>55</sup> These include: no self-incrimination; confronting an accuser; due process.

<sup>56</sup> Due process under *Callie v. Bowling*, 123 Nev. 181 (2007) was also violated.

<sup>57</sup> *Lewis v. Lewis*, 132 Nev. Adv. Op. 46, 373 P.3d 878 (2016).

<sup>58</sup> See *Fuentes v. Shevin*, 407 U.S. 67 (1972).

notices to Detwiler each indicated that *only* civil contempt was being sought.<sup>59</sup> This is not proper notice for criminal contempt. The Trial Court even acknowledged if criminal sanctions are contemplated – the proceedings are no longer civil, and due process requires a new evidentiary hearing – which was duly affirmed by counsel for BBNB.<sup>60</sup> Despite this absolute and correct acknowledgement, a separate evidentiary hearing was not held and, instead, criminal sanctions were issued.

**iii. The Trial Court issued criminal sanctions based upon a standard less than beyond a reasonable doubt**

This Court has recognized that where a contempt proceeding is even “quasi-criminal” in nature, the contempt must be proven “beyond a reasonable doubt.” *See Kellar v. Eighth Judicial Dist. Court*, 86 Nev. 445, 448, 470 P.2d 434, 436–37 (1970) (“When the appellant challenged Judge O'Donnell, and requested his disqualification, the judge complied and assigned the matter to Judge Mendoza, who determined that the matter was quasi-criminal in nature and required the respondent to prove the contempt beyond a reasonable doubt.”). Here, the Trial Court failed to comply with this requirement. In issuing criminal contempt sanctions, the Trial Court failed to require BBNB to prove the contempt beyond a reasonable doubt. In speaking on the standard it implemented instead, the Trial Court indicated that the

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<sup>59</sup> Appx. Vol. I, at PA00221-PA00238 and PA00239-PA00240 and Appx. Vol. III, at PA00583-PA00634.

<sup>60</sup> Appx. Vol. IV, at PA00784-834, at 30:22-31:1.

standard it employed was “higher than a preponderance of the evidence, **but it doesn’t rise to a level of beyond a reasonable doubt, but a clear and convincing evidence standard.**”<sup>61</sup> As noted above, when BBNB drafted the Order for Sanctions, it included that the contempt finding was “beyond a reasonable doubt”.<sup>62</sup> This was disingenuous as the Trial Court had expressly denied using that standard, but only goes to prove the criminal nature of the sanctions.

**c. BBNB does not exist.**

There is no such entity as “Baker Boyer National Bank, a Washington corporation”.<sup>63</sup> The Sanctions Order and Judgment are in favor of a nonexistent entity. As a clear admission of this significant error, in a recent filing (Appx. Vol. IV/V, at PA00999-PA01037), BBNB unilaterally, without leave, removed “a Washington Corporation” from the caption in violation of NRCP 60. This Court has made clear that “[a] judgment for a legally nonexistent entity is a nullity.”<sup>64</sup>

**d. The orders at issue are ambiguous.**

While the Trial Court found in its January 2019 Order that Foust owned all of

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<sup>61</sup> Appx. Vol. IV, PA00836, ll. 20-23.

<sup>62</sup> Appx. Vol. IV, at PA00875-PA00882, at 6:16-18.

<sup>63</sup> *The Baker Boyer National Bank of Walla Walla* exists, but that is not the judgment creditor. See charter for “The Baker Boyer National Bank of Walla Walla” (Appx. Vol. IV, at PA00960) and Washington Secretary of State’s Certificates of No Record (Appx. Vol. IV, at PA00989 and PA00991).

<sup>64</sup> *Causey v. Carpenters S. Nevada Vacation Tr.*, 95 Nev. 609, 610, 600 P.2d 244, 245 (1979); *Garland Family Trust v. Melton*, 2020 WL 1531769 (March 2020).

the Subject Vehicles, it also included an order to Detwiler to turn over Subject Vehicles owned and controlled by Foust. This violates the requirement that “an order for civil contempt must be grounded upon one’s disobedience of an order that spells out ‘the details of compliance in clear, specific and unambiguous terms so that such person will readily know exactly what duties or obligations are imposed on him.’”<sup>65</sup> How can Detwiler turn over vehicles which the Trial Court found unequivocally were owned, possessed and controlled by the Defendant Foust? Moreover, the Detwiler Contempt Order also ordered Detwiler to turn over the Motorcoach, which the Trial Court found BBNB had already repossessed, and four of the Subject Vehicles which the Trial Court had previously found were not the proper subject of a contempt citation.<sup>66</sup> Detwiler could not possibly comply with these orders. “A court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’ ” *See Turner v. Rogers*, 564 U.S. 431, 442 (2011).<sup>67</sup> Accordingly, a stay is warranted.

**e. The Trial Court committed error warranting issuance of the Writ in refusing to recuse himself after Detwiler’s NRS 22.030(3) Objection.**

NRS 22.030(3) provides that regarding an indirect contempt charge, “the judge of the court in whose contempt the person is alleged to be shall not preside at

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<sup>65</sup> *Southwest Gas Corp. v. Flintkote Co.*, 99 Nev. 127, 131, 659 P.2d 861, 864 (1983).

<sup>66</sup> Appx. Vol. III, at PA0000529, ll. 7-10.

<sup>67</sup> *Citing Hicks v. Feiock*, 485 U.S. 624, 638, n. 9, (1988).

the trial of the contempt over the objection of the person.” NRS 22.030 (West). Nevada’s public policy, as upheld by this Court in *Awad* and *McCormick*<sup>68</sup> requires this Court to review this Petition as the Trial Court refused to recuse himself after Detwiler filed his NRS 22.030(3) Objection, despite no contempt order against Detwiler having been entered.<sup>69</sup> *See Awad v. Wright*, 794 P.2d 713, 106 Nev. 407 (1990); *McCormick v. Dist. Ct.*, 67 Nev. 318, 218 P.2d 939 (1950).

Before the Detwiler Contempt Order was entered, Detwiler timely filed his NRS 22.030(3) Objection, objecting to Judge Scotti presiding at any further proceedings regarding Detwiler’s alleged contempt.<sup>70</sup> Despite recusal being automatic under NRS 22.030(3), the Trial Court judge refused to recuse himself and continued to preside over the contempt proceedings, including entering the Detwiler Contempt Order, Sanctions Order, and related Judgment after Detwiler’s Objection. The grievous nature of a violation of such an objection was set forth in this Court’s decision in *Awad*<sup>71</sup> as follows:

Awad argues that Judge Shearing committed reversible error when she did not recuse herself under Awad’s NRS 22.030(3) peremptory challenge. We agree. ...  
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<sup>68</sup> Nevada’s public policy upheld in *Awad* and *McCormick* states that “the legislature of this state felt it important to eliminate the possibility of a reasonable apprehension that a judge might not be entirely free from bias in enforcing the orders and decrees of the court of which [she] he is the judge.”

<sup>69</sup> NRS 22.030(3) Objection (Appx. Vol. III, at PA00676-PA00677).

<sup>70</sup> Appx. Vol. III, at PA00676-PA00677.

<sup>71</sup> *Awad v. Wright*, 106 Nev. 407, 794 P.2d 713, 715 (1990).

Judge Shearing's refusal to recuse herself, coupled with her fining Awad \$2,000.00 when the maximum fine provided by NRS 22.100(1) was only \$500.00, are strong indications of a bias against Awad. The purpose of the legislature in passing an automatic recusal was precisely to avoid such situations. Based on NRS 22.030 and on the McCormick case, Judge Shearing committed reversible error when she did not recuse herself when Awad requested her to do so.<sup>72</sup>

NRS 22.030(3) exists to prevent decisions based on anger at the presiding judge's own order purportedly having been violated. That is exactly what happened here. The Objection was timely, as neither the Detwiler Contempt Order, nor the Sanctions Order or related Judgment had been entered at the time of the Objection, nor had the Trial Court made any findings of contempt by Detwiler. After the Objection, the Trial Court impermissibly continued to preside over the proceedings, including receiving evidence, making additional findings of contempt, and imposing sanctions.

Further, after the Objection, the Trial Court converted the sanctions from civil to criminal. Such action affirms the timeliness of the Objection, and renders the Trial Court's refusal to comply more egregious. As in *Awad*, this Court should determine the Trial Court committed serious error warranting issuance of the requested writ.

**f. The Sanctions Order violates Nevada law.<sup>73</sup>**

***i. \$100,000.00 sanction is 200 times the maximum limit.***

This Court previously found strong indications of a bias against Awad when

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<sup>72</sup> *Id.*

<sup>73</sup> Trial Court exceeded its jurisdiction. *Del Papa v. Steffen*, 112 Nev. 369 (1996).

the Trial Court Judge sanctioned the party at issue \$2,000 for the alleged contempt – four (4) times the allowable limit in NRS 22.100.<sup>74</sup> Here the Trial Court sanctioned Detwiler **\$100,000.00 – 200 times the allowable limit**. Based upon *Awad*, such sanction constitutes strong indications of a bias against Detwiler.<sup>75</sup>

***ii. Trial Court sanctioned a non-party (Detwiler) as a party under EDCR 7.60(b) as an end-run around NRS 22.100(2).***

Despite the clear and unambiguous language of NRS 22.100(2), as well as NRS 193.150(1), the Trial Court looked outside these statutes to issue sanctions against Detwiler, in excess of the allowable limits.<sup>76</sup> The Court issued sanctions against Detwiler under EDCR 7.60(b);<sup>77</sup> however, this rule only authorizes sanctions to be “impose[d] upon...a party”. See EDCR 7.60(b). The Plaintiff never requested EDCR 7.60(b) sanctions and the Trial Court issued them without notice or opportunity to be heard on sanctions under EDCR 7.60(b). More importantly, as this Court has already determined, Detwiler is not a party.<sup>78</sup>

***iii. The award of attorneys’ fees and costs were improper.***

The Trial Court’s strong bias against Detwiler is further demonstrated by the

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<sup>74</sup> See *Awad*, 794 P.2d at 715 (1990); see also NRS 21.100(3)(“...if a person is found guilty of contempt, a fine may be imposed on the person not exceeding \$500...).

<sup>75</sup> The maximum limit for criminal contempt is only \$1,000.00. See NRS 199.340(4); see also NRS 193.150(1).

<sup>76</sup> *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. Adv. Op. No. 52, 399 P.3d 334, 344 (2017).

<sup>77</sup> Appx. Vol. IV, at PA00839 and PA00880-881.

<sup>78</sup> Appx. Vol. IV, at PA00996.

attorney's fees award against him. NRS 22.100(3) allows an award of only those attorneys' fees "incurred by the party **as a result of the contempt.**" Despite no finding by the Trial Court that the Plaintiff had incurred fees *as a result of Detwiler's purported contempt* – as opposed to that of Foust<sup>79</sup> – the Trial Court awarded fees incurred from the time Detwiler "was officially a party in this action".<sup>80</sup> Further, despite there being no order directed at Detwiler before January 2019 – and in violation of its own statements – the Trial Court proceeded to award fees and costs from March, 2018 onward, totaling \$218,885.52.<sup>81</sup> Of this amount, \$118,036.72 was incurred prior to any order directing Detwiler to do anything.<sup>82</sup>

**3. The object of the petition will be defeated if the stay is denied.**

The Writ Petition is filed to challenge the Trial Court's orders which amount to a monetary Judgment against Detwiler in excess of \$318,000.00.<sup>83</sup> The object of this Petition is to correct the constitutional violations and substantial errors committed by the Trial Court. Preserving the status quo by issuing a stay best serves the public interest. A denial would only serve as a grave injustice to Detwiler's due process rights as well as Nevada's public policy ("for the preservation of the respect and high

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<sup>79</sup> See *Mayfield v. Koroghli*, 124 Nev. 343, 346, 184 P.3d 362, 364 (2008); *State, Dep't of Indus. Relations, Div. of Indus. Ins. Regulation v. Albanese*, 112 Nev. 851, 856, 919 P.2d 1067, 1070 (1996).

<sup>80</sup> Appx. Vol. IV, at PA00837.

<sup>81</sup> Appx. Vol. IV, at PA00845 and PA00951.

<sup>82</sup> Appx. Vol. IV, at PA00861, ll. 14-25.

<sup>83</sup> Appx. Vol. IV, at PA00875-PA00882 and PA00950-PA00955.

regard the public has always maintained for the courts”), which was specifically upheld by this Court in *Awad* and *McCormick*.<sup>84</sup> A stay pending review must issue.

**4. Detwiler will suffer irreparable/serious injury if the stay is denied**

A denial of the stay would force Detwiler to either post a supersedeas bond, which he is likely unable to do, or file for bankruptcy protection. The constitutional violations and substantial errors should be fully addressed by this Court prior to any collection activities by BBNB, and a stay will allow that to occur. Failure to issue a stay will cause Detwiler to suffer irreparable, permanent harm far beyond this proceeding, including to his reputation and business dealings. Recently, BBNB informed Detwiler of Foust’s death. As a result, Detwiler has been irreparably harmed by not being able to cross-examine Foust.<sup>85</sup> Further, with Foust’s death, BBNB will now focus all of its collection efforts against Detwiler and the Trial Court may commit additional errors in enforcing collection efforts against Detwiler. In fact, by filing an Application for Charging Order, BBNB has already commenced collection and execution efforts in violation of the Stay Orders currently in place. Allowing BBNB to continue pursuing collection would be a grievous miscarriage of justice.

**5. A stay being granted will not irreparably harm BBNB**

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<sup>84</sup> *Awad v. Wright*, 794 P.2d 713 (1990); *McCormick v. The Sixth Judicial Court*, 67 Nev. 318, 218 P.2d 939 (1950).

<sup>85</sup> Evidentiary, or “defense” prejudice, may arise by reason of a defendant’s inability to present a full and fair defense on the merits due to ... the death of a witness ... thereby undermining the court’s ability to judge the facts. *Universal Electronics v. Universal Remote Control*, 34 F.Supp.3d 1061 (C.D. Cal. 2014).

Granting of a stay will not irreparably harm or seriously injury BBNB. As set forth above, the numerous constitutional violations and substantial errors committed by the Trial Court make clear the amounts awarded against Detwiler – in favor of a nonexistent entity – are invalid. A stay in this matter will not affect the BBNB’s ability, such as it is, to pursue the Estate of the actual judgment debtor – Foust – while Detwiler’s Writ Petition is pending. Since advising of Foust’s death, BBNB has attempted to improperly pinned its inability to collect on the Foust Judgment on Detwiler. Regardless of the double standard taken by BBNB, a stay will not irreparably harm BBNB. Given the serious violations of Detwiler’s constitutional rights, a stay pending review of the Petition is the only fair and equitable result and will preserve the status quo while this Court reviews Detwiler’s Writ Petition.<sup>86</sup>

### **III. CONCLUSION**

For all these reasons, Detwiler respectfully requests this Court grant his Motion to Stay.

DATED: May 22, 2020.

**HUTCHISON & STEFFEN**

By /s/ Brenoch Wirthlin, Esq.

Mark A. Hutchison, Esq. (No. 4639)

Michael K. Wall, Esq. (NV Bar 10282)

Brenoch Wirthlin, Esq. (NV Bar 10282)

*Attorneys for Petitioner*

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<sup>86</sup> *Lewis v. Lewis*, 132 Nev. Adv. Op. 46, 373 P.3d 878, \_\_\_\_ (2016).

### **NRAP 27(e) CERTIFICATE**

I, Brenoch Wirthlin, Esq., hereby certify, pursuant to NRAP 27(e), to the following:

1. The telephone number and office address of parties are as follows:

John Bragonje, Esq.  
Lewis Roca Rothgerber Christie  
3993 Howard Hughes Pkwy., Suite 600  
Las Vegas, Nevada 89169  
(702) 474-2625  
*Attorney for Real Party in Interest*

The Honorable Richard Scotti  
District Court, Dept. 2  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, Nevada 89155  
Phone No.: (702) 671-4318  
*Respondent*

2. An emergency exists requiring this Motion to be heard in less than 14 days in order to avoid Detwiler from suffering immediate, irreparable harm. Currently, the following stay orders are in place:

- a. The Trial Court provided a temporary stay of 45 days from notice of entry of the Order denying stay, which was filed on April 13, 2020. Appx. Vol. IV, at PA00992-PA00994. As such, the Trial Court's temporary stay expires **May 29, 2020**; and
- b. In response to the global pandemic of COVID-19, the District Court issued Administrative Order ("A.O.") #20-09, which stays execution until such Order is lifted. See A.O. #20-09.

3. In violation of the above stay orders, on May 15, 2020, BBNB filed with the Trial Court an Application for Charging Order, wrongfully claiming that

“[Mr.] Detwiler’s assets are subject to immediate execution.” Appx. Vol. IV/V, at PA00999-PA01037.

4. Given BBNB’s outright refusal to follow the current stay orders, this Motion should be heard on an emergency basis.

5. If this Court does not hear this Motion on an emergency basis, BBNB will continue with its collection and execution efforts, which will irreparably harm Detwiler.

6. Detwiler will be forced to either post a supersedeas bond or file for bankruptcy protection; either option requires Detwiler to take immediate action given the quickly approaching stay expiration, and Detwiler may be unable to do so.

7. As this Court is well aware, the entire country is going through a global pandemic known as the Coronavirus, where businesses in Nevada, and throughout the country, have either shutdown entirely or are operating on a limited basis.

8. The sooner Detwiler is aware of the decision on his Motion to Stay, the sooner he can work to have the appropriate professionals assist in taking action, which will likely prove to be extremely problematic given the current pandemic.

9. Without this Court hearing this Motion to Stay on an emergency basis, Detwiler will suffer immediate, irreparable harm and will be subject to collection efforts continuing against him.

10. Further, in handling the collection proceedings, Detwiler believes there is a good likelihood that the Trial Court may further violate Detwiler's constitutional and due process rights and/or commit additional errors warranting issuance of the Writ.

11. This Court has the opportunity to preserve the status quo and avoid these additional violations and substantial errors by issuing a stay on an emergency basis.

12. The Respondent and counsel for BBNB were notified by e-mail on May 22, 2020 that the instant Motion would be filed. Additionally, my office notified the Nevada Supreme Court Clerk by phone on May 22, 2020.

13. A filed copy of this Motion will be served on the parties as indicated in the certificate of service provided below.

14. As such, before filing the motion, I have made every practicable effort to notify the clerk of the Supreme Court and opposing counsel, and to serve the motion at the earliest possible time.

15. This emergency motion is filed at the earliest possible time.

I declare under the penalty of perjury of the laws of the State of Nevada that the statements herein are true and correct.

Dated: May 22, 2020.

By: /s/ Brenoch Wirthlin, Esq.  
Brenoch Wirthlin, Esq.

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that, pursuant to NRAP Rule 25(d), I served the foregoing **PETITIONER'S EMERGENCY MOTION UNDER NRAP RULE 27(e) TO STAY EXECUTION OF CONTEMPT JUDGMENTS PENDING REVIEW OF PETITION FOR WRIT OF MANDAMUS/PROHIBITION** on the following parties, via the manner of service indicated below, on May 22, 2020:

***Via Electronic Service through E-Flex System:***

John Bragonje, Esq.  
Lewis Roca Rothgerber Christie  
3993 Howard Hughes Pkwy., Suite 600  
Las Vegas, Nevada 89169  
[JBragonje@lrrc.com](mailto:JBragonje@lrrc.com)  
*Attorney for Real Party-in-Interest*

***Via US Mail:***

The Honorable Richard Scotti  
District Court, Dept. 2  
Regional Justice Center  
200 Lewis Ave.  
Las Vegas, Nevada 89155  
Phone No.: (702) 671-4318  
*Respondent*

James Foust or his Estate  
8175 Arville St.  
Las Vegas, Nevada 89139  
*Defendant*

Harry Hildibrand, LLC  
3011 American Way  
Missoula, Montana 59808  
*Third Party*

Dated: May 22, 2020.

By: /s/ Danielle Kelley  
An Employee of  
Hutchison & Steffen